



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: G&G Steel, Inc.

File: B-225750

Date: April 1, 1987

DIGEST

1. Agency properly rejects a bid as nonresponsive where the irrevocable letter of credit submitted as a bid guarantee is conditioned on the contract being assigned to the issuing bank. If the contractor failed to furnish performance and payment bonds, the contract would be subject to termination for default, and no valid contract that could be assigned would exist. Moreover, such a letter does not provide the required firm commitment.
2. Since a bid guarantee is a material requirement that must be met at the time of bid opening, a bid that is nonresponsive due to the lack of an adequate guarantee generally cannot be made responsive by furnishing one in proper form after bid opening.
3. Protest that invitation for bids should not have required a bid guarantee and/or performance and payment bonds is untimely where not filed before bid opening.

DECISION

G&G Steel, Inc. protests the rejection of its apparent low bid under invitation for bids (IFB) No. DACW59-87-B-0020, issued December 22, 1986, by the U.S. Army Corps of Engineers, Pittsburgh District, for the fabrication of river lock gates. The Corps found a letter of credit submitted by G&G Steel as a bid guarantee to be materially defective, and it rejected the bid as nonresponsive.

We dismiss the protest.

The IFB required each bidder to submit with its bid a bid guarantee in the amount of 20 percent of the bid price or \$3,000,000, whichever was less. The solicitation cautioned, in accord with the applicable Federal Acquisition Regulation (FAR) provision, that failure to furnish a guarantee in the proper form and amount by the time set for bid opening might

result in rejection of the bid. See 48 C.F.R. §§ 28.101-4 and 52.228-1 (1986).

G&G Steel submitted with its bid an irrevocable letter of credit issued by the Valley State Bank of Russellville, Alabama on January 26, 1987. The letter, in the amount of \$115,000, referenced the correct solicitation number and indicated that the credit was available upon written demand "signed by a duly authorized agent of the U.S. Army Engineers at sight." The letter provided that demand must be accompanied by an assignment of the contract "as referenced in inquiry No. DACW59-87-B-0020."

In rejecting the protester's bid, the Corps stated that in the event that the protester was unable to furnish performance and payment bonds, the government would find the firm in default of the contract, and indicated that as a result, assignment of the contract would not be possible.

The protester now contends that its letter of credit should be accepted because the bank made an error in requesting the assignment, but has offered to correct it, and because the solicitation provided that failure to furnish a bid guarantee in the proper form "may be cause" for rejection of the bid.

A bid guarantee is a firm commitment that assures that a successful bidder will execute such contractual documents and provide such payment and performance bonds as may be required. Its purpose is to secure the surety's liability to the government for excess procurement costs in the event the bidder fails to honor its bid. See Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. The key question in determining the sufficiency of a bid guarantee is whether the government will be able to enforce it. See Ensco Environmental Services, Inc.--Request for Reconsideration, B-224266.2, Oct. 24, 1986, 86-2 CPD 456.

In this case, we think it is doubtful whether the Corps could enforce the letter of credit in case of default by G&G Steel, since the letter contains a provision requiring assignment of the contract to the issuing bank. If G&G Steel in fact failed to execute the contract or failed to furnish payment and performance bonds, its contract would be subject to termination for default. At that point, no valid contract that could be assigned would exist. Under the circumstances, the Corps properly determined that the letter of credit fell short of the required firm commitment, and it properly rejected the protester's bid as nonresponsive.

With regard to G&G Steel's argument concerning the IFB language, the solicitation clause providing that failure to comply with the bid guarantee requirement "may be cause" for rejection cannot be viewed as discretionary; it is just as compelling and material as if more positive language were employed. See Building Systems Contractors, Inc., B-219416, July 9, 1985, 85-2 CPD ¶ 36.

Further, G&G Steel's attempt after bid opening to have the bank amend its unacceptable letter of credit cannot be considered, since a nonresponsive bid cannot be made responsive by actions taken after bid opening. When required, a bid guarantee is a material part of a bid and must be furnished with the bid. Baucom Janitorial Service, Inc., B-206353, Apr. 19, 1982, 82-1 CPD ¶ 356. Noncompliance with the bid guarantee requirement can only be waived under those limited conditions specified in the FAR, 48 C.F.R. § 28.101, none of which are present here.

To the extent that G&G Steel raises any objection in its protest to the bonding requirements, this basis for protest is untimely, since it was not filed before bid opening date. Protests based upon alleged improprieties in an IFB must be filed before bid opening. See 4 C.F.R. § 21.2(a)(1) (1986); Sheffield Measurement Division--Request for Reconsideration, B-224618.2, Sept. 23, 1986, 86-2 CPD ¶ 339.

The protest is dismissed.

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